IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6452 OF 2007

Ashok Prabhakar Mastakar .. Petitioner

Versus

Ramchandra Mahadev Parte .. Respondent

Mr.N.V.Walawalkar, Senior Advocate with Mr.S.R.Bhalekar for petitioner

Mr.G.S.Godbole with Harish Pawar for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 17th December 2007

ORAL JUDGEMENT:-

. Rule. By consent of parties heard finally. Respondent waives service.

2. This petition challenges an order passed by the lower appellate court dated 25th July 2007 in Appeal No.61 of 2007. The lower appellate court by the impugned order has allowed the appeal which was a miscellaneous civil appeal and reversed the order of the trial court, which was an interim order, in Regular Civil Suit No.3 of 2007. By its order dated 15th May 2007, the trial court allowed the application and directed that the respondent before me who is party defendant to the suit should not till the hearing and final disposal of the suit, either by himself or anybody claiming through him, disturb physical possession of the present petitioner in respect of the suit property.

3. Aggrieved by this order, the above appeal was preferred by the respondent original defendant and that having been allowed, the petitioner plaintiff in the above R.C.S. is before me.

4. It appears from the record that the property was purchased by the petitioner in an auction. That auction was held pursuant to respondent defendant defaulting in payment of the dues which were due and payable to the Coop.Bank viz., Jaoli Coop.Bank. Upon the possession of the property being taken over by the Bank under Securitisation Act, it was put up for auction and the petitioner's bid having been accepted, other proceedings took place and my attention is invited to the sale certificate in that behalf. The sale certificate, a copy of which is annexed to the compilation tendered on behalf of petitioner as also respondent, states that Dattatraya Maharaj Jaoli Sahakari Bank had advanced certain monies to respondent before me and his loan liability was Rs.96,28,249/- as on 22nd July 2006. The property was subject matter of mortgage and that is how the bank proceeded under the Securitisation Act and vide further

powers conferred thereunder proceeded with the Auction. The sale certificate reads thus:-

"WHEREAS:

. The undersigned being the authorised officer of the Dattatraya Maharaj Kalambe Jaoli Sahakari Bank Ltd., Mumbai 418/20, Maulana Azad Road, Mumbai 400 004 and appointed as per the provisions under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) Ordinance 3 of 2002. And in exercise of the power confirmed under sub-section 12 of Section 13 read with rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002. Sold on behalf of the Dattatraya Maharaj Kalambe Jaoli Sahakari Bank Ltd., Mumbai 418/20 Maulana Azad Road, Mumbai 400 004

in favour of Shri Ashok Prabhakar Mastakar R/o.Shantaram Nivas, Flat No.12, Gokhale Road, (North), Dadar West, Mumbai 400 028. The immovable property shown in the Schedule below.

. The immovable property mentioned in the Schedule hereinafter appearing lastly was mortgaged with aforesaid mention creditor bank on 06/08/2003 and now by way of auction sale dated 24/8/2006, sold the said immovable property to aforesaid mention purchaser towards the loan liability of Rs.96,28,249/- as on 22/7/2006, which was given to Shri Dr.Ramchandra Mahadev Parte R/o.Tapola, Taluka Mahabaleshwar, Dist.Satara on 18/8/2003 for the amount of Rs.65,00,000/-.

. For the aforesaid purpose the

authorised officer appointed as per the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) Ordinance 3 of 2002, obtained the possession of said immovable property as mentioned in Schedule lastly from the District Magistrate (Collector) Satara on 27/4/2006, and then after inviting the tenders for sale in public. The proceeding under the said Act, also confirmed from the Hon’ble Debt Recovery Tribunal Pune in Appeal No.20 of 2006 dated 18/7/2006.

. And as per the provisions of the said Act, the authorised officer on 24/8/2006 by way of auction sale held at head office at 418/20 Maulana Azad Road, Mumbai 400 004 confirmed the sale in favour of Shri Ashok Prabhakar Mastakar

for the amount of his tender offer of Rs.85,00,006/-

. The authorised officer on behalf of the said creditor bank acknowledge the receipt of the sale price Rs.85,00,006/-. As 25% amount as Rs.10,000/- by way of D.D. No.61710 on date 22/8/2006 Rs.21,15,006/- by way of A/c.payee cheque No.309240 from H.D.F.C. on date 25/8/2006 and remaining 75% amount of Rs.63,75,000/- by way of A/c.payee cheque No.309241 from H.D.F.C. on date 9/9/2006.

. The possession of immovable property as mentioned in following schedule is handed over and delivered to the purchaser on 23rd September 2006.

. The sale of the scheduled

property was made free from all encumbrances known to the secured creditor."

5. It is undisputed before me that the respondent defendant had filed Special Civil Suit No.166 of 2006 which is pending in the Civil Court and in the said suit, he claimed a declaration against the present petitioner and the bank to the effect that his physical possession in respect of the said property shall not be disturbed by the petitioner - purchaser and the bank. The suit is filed on 18th November 2006. However, there is no interim order in favour of the respondent operating in the said suit.

6. Equally, it is accepted before me that the respondent did not challenge the sale, which was under the Securitisation Act, by taking recourse to the remedy available under the said

Act.

7. It is in these circumstances, that when physical possession of the petitioner was being disturbed by the respondent - defendant that the above suit was filed by the petitioner.

8. The plaint averment in the petitioner's suit proceed on the basis that the petitioner has purchased the property at the auction. The auction has concluded. The petitioner further pleaded that the said property was handed over on 23rd September 2006 after the entire sale price was tendered and a sale certificate was issued. The plaint averments proceed on the basis that the petitioner has become owner of the property. However, when the petitioner was threatened that the continuous electricity and water connection to the premises would be interfered with and snapped, that he decided to approach the civil court and pray for permanent injunction. The

permanent injunction is to restrain the present respondent from in any manner disrupting the M.S.E.B. connection, water connection so also interfering with the petitioner's possession by obstructing their servants, agents in any manner.

9. An application for interim injunction was filed, which application was duly served on the defendant. The respondent defendant has in reply to the application for injunction, purported to question the sale. The sale itself is vitiated, according to respondent, for the reasons set out in the affidavit in reply/written statement. Thereafter, the application was placed before the trial court which adverted to all these facts and in para 10 referred to the position that Securitisation Act was resorted to and having completed the process of Auction thereunder, the property was handed over. The possession receipt in favour of the Bank has been referred to. Panchanama at site has also been referred to.

The sale deed also is referred to by the Trial Court with the factum of possession being handed over to petitioner by the Bank. It is in such circumstances and having found that the petitioner was in possession that the injunction order was passed.

10. Aggrieved thereby, respondent has preferred civil miscellaneous appeal No.61 of 2007 which has been allowed. The Dist.Court is fully aware of the fact that the civil court has very limited right to question the actions under Securitisation Act. It is fully aware of the decision of the Supreme Court in Mardia Chemicals Vs. Union of India, reported in 2004 (2) Mh.L.J. 1090. However, its reasoning in paras 9, 10 and 11 proceeds on the basis that the petitioner himself having invoked the jurisdiction of the civil court, the issue of jurisdiction of the civil court need not detain him. Secondly, the lower appellate court refers to the proceedings

before the D.R.T. and observes that the dispute is pending. However, before me, it is common ground that no proceedings before the D.R.T. are pending. The lower appellate court, thereafter, proceeds on the basis of alleged breach of Rule 9 of the Security Interest (Enforcement) Rules 2003 and sub-rule (3) thereof and observes that the sale certificate cannot be said to be proper because 25% of the total consideration was not tendered forthwith, but on the next day. It is in such circumstances and relying upon a decision of the Supreme Court in the case of Manilal Shah Vs. Sardar Sayed Ahmed Sayad Mahmad, reported in A.I.R. 1954 S.C. 349, that it reversed the order of the trial court.

11. Mr.Walawalkar, learned Senior Counsel for petitioner contended that the lower appellate court's order is ex facie bad in law. It is vitiated by patent illegality, inasmuch as, the lower appellate court being fully aware of the

mandate of section 34 of the Securitisation Act, could not have questioned the injunction of the trial court in the suit of petitioner on the basis that the provisions of Securitisation Act have not been complied with. He invites my attention to section 34 and submits that the suit filed by the respondent before the trial court, being R.C.S.No.166 of 2006 was not maintainable. That apart, he filed an application for injunction therein which application has been rejected on 29th January 2007. The matter was not pursued by the respondent further. Secondly, the respondent has not approached the D.R.T. or the D.R.A.T., questioning the sale and violation of the mandate of the Rules in that behalf. In such circumstances, when all documents evidence at this prima facie stage that the property has been sold, consideration tendered and physical possession handed over, then, the trial court's order require no interference. In such circumstances, ignorance of all this material on

record, vitiates appellate court's order and it can be safely termed as perverse. He submits that this is a fit case for exercising jurisdiction under Article 227 of Constitution of India.

12. Mr.Godbole for respondent on the other hand submits that the sale certificate which is placed on record would evidence that consideration has not been tendered as per the mandate of Rule 9. The sale was ex facie bad. The other civil suit No.166 of 2006 is pending. Even if the application for injunction therein is rejected, that by itself is no ground for the lower appellate court to exercise its discretion and interfere with the order of the trial court in the petitioner's suit. He has invited my attention to the decisions of the Supreme Court and Division Bench of this Court. He also submits that the law laid down in Mardia Chemicals (Supra) is that a Civil Suit is not

totally barred. In such circumstances, the lower appellate court was right in concluding that the order of the trial court deserves to be interfered with.

13. Alternatively, he submits that there is an order of status quo granted by this Court. Now reverting physical possession back to the petitioner would be unjust and unfair. The property is being maintained by the respondent and he is ready and willing to deposit such sums as are directed by this Court. Therefore, the order under challenge need not be interfered with.

14. I have perused the petition and the annexures thereto including the impugned order. It is pertinent to note that the petitioner is party to a suit being Special Civil Suit No.166 of 2006 which is filed by the present respondent and one Vishal Rameshchandra Parte. The suit is

filed for a declaration that the sale deed dated 9th October 2006 which is in favour of the present petitioner is bad in law and not binding upon the plaintiffs. Further, they had also sought reliefs of permanent injunction restraining the bank as also the present petitioner from obstructing their possession over the suit property. The suit properties in both suits are the same. It is of some relevance to note that the application for temporary injunction (Exh.5) in the respondent's suit has been rejected. The reasoning of the learned trial Judge therein is that Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as well as provisions of the Cooperative Societies Act and C.P.C., if perused, prima facie, make the application untenable. The prima facie finding is that the sale is complete. The reasoning is that the Court has virtually no jurisdiction at this stage. Now, this order of 29th January 2007

remains unchallenged.

15. Self-same contentions were raised by the respondent in the petitioner's suit being R.C.S.No.3 of 2007 which was filed for permanent injunction. A copy of the reply to the application Exh.5 filed on behalf of respondent (Exh.E to the petition), proceeds on the basis that the contentions of the petitioner are false. There is a reference made to the mortgage deed. There is also a reference made to the pending suit instituted by the respondent. There is also a reference made to the fact that the petitioner has colluded with the Specified Officer and has purchased the property at the auction. The reply proceeds on the basis that the sale itself is void. After this reply was filed, the trial court perusing the same has more or less taken the same view that was taken by the trial judge in the suit instituted by the respondent. That prima facie view and the present prima facie view

of the trial Judge proceeds on the same lines. The trial Judge in the present case in para 10 may have referred to the petitioners as bonafide purchasers for value yet, it has rightly, at this stage, placed reliance upon documents evidencing the sale. These are documents which have been produced and relied upon by both sides. At this stage, it was not permissible for the respondent to question their authenticity, genuineness and whether they would constitute a valid sale or not. Admittedly, all documents commencing from the sale notice which is dated 23rd July 2006 up to the sale deed dated 9th October 2006 including the panchanama and possession receipt are there on record. The possession receipt Exh.9/1 and 9/2 shows that the suit property has been handed over to the Coop.Bank. The panchanama shows that Tahsildar Mahabaleshwar has taken possession thereof. The possession has been taken over from the present respondent. This is all in pursuance of the order of Dist.Magistrate under the

Securitisation Act. This order under section 13(4) thereof, thereafter enables the bank to proceed and sell the property. That is the scheme of the Act itself. It is in such circumstances and when the bank gave full opportunity to the respondent debtor, that the property was put up for sale. The observations of the D.R.T. in Appeal No.20 of 2006 have also been perused by the trial Judge in this case.

16. It is in such circumstances and relying upon several decisions interpreting the subject provisions of the Securitisation Act that the trial court holds that in the given facts and circumstances, it cannot question the auction sale and unless and until the auction has been set aside so also the sale deed nullified by competent court/Authority, the petitioner cannot be prevented from claiming the injunction sought by him.

17. The trial court thus held that petitioner has made out a strong prima facie case, balance of convenience is in his favour and having obtained the sale certificate so also sale deed grave and irreparable loss, harm and injury will be caused to him, if he is now prevented from possession and enjoyment of the property. Such an order, to my mind required no interference in the light of the admitted facts. Merely because civil suit filed by the respondent is pending or that the respondent invites the attention of the lower appellate court to the Security Interest (Enforcement) Rules 2003, is no ground to interfere with the discretion exercised by the trial court. The reasoning of the lower appellate court proceeds on the basis that the civil court can questioned the entire auction procedure under the Securitisation Act. It may be that the sale can be question as observed by the Supreme Court and held in Mardia Chemical’s case. However, that is a case of proven fraud.

Here, prima facie, the documents which have been placed on record will have to be believed. More so, when the respondent could not succeed in getting an injunction in his favour in his own suit. Further, he has not resorted to the remedies provided by the Securitisation Act. By instituting a suit in the civil court or by questioning the sale, in the affidavit in reply to an application for interim injunction in the instant suit, does not mean that the sale becomes automatically bad or vitiated in law. That aspect will have to be proved by the respondent by leading evidence. Until that stage is reached, it was not permissible in the present facts and circumstances to have permitted the respondent to interfere with the petitioner's possession.

18. The Authorities and decisions brought to my notice by Mr.Godbole coupled with Rule 9 would make it clear that it is not as if the respondent

has no opportunity at all to prove that the sale is vitiated by fraud. He will have to prove that the purchaser immediately did not deposit 25% of the amount of sale price to the authorised officer conducting the sale so also balance price by 15th day. The respondent is free to lead evidence in his own suit so also in the instant suit. Until that material is placed and the matter is heard finally, the respondent could not have taken law in his hands and interfered with the possession of the petitioner.

19. In such circumstances, Rule is made absolute. The order under challenge is set aside. The order of trial court is restored, however, with condition that the petitioner shall not create any third party rights nor part with possession of the suit property until final decision in the suit. In the peculiar facts of this case, after the lower appellate court’s order if the respondent has interfered with

petitioner's possession or that status quo at site was directed to be maintained does not mean that the petitioner has lost possession. The possession was lost by the respondent prior to the sale in favour of the petitioner. There is no merit in the submission that I am restoring status quo ante. Equally, it would be for the petitioner to apply for all licenses and until and unless he obtains such authorisation and licenses, the property would not be put to use as an hotel.

20. It is not permissible for me now to take cognisance of the request of Mr.Godbole and allow the respondent to deposit any sums as prayed. That apart, the respondent is only offering to pay or deposit a portion of the sale price. The sale price has been tendered in August 2006. In such circumstances, it will be neither equitable nor fair, just and proper to accept this plea.

21. Mr.Godbole, states that Rs.16 lakhs have already been deposited and he would deposit Rs.80 lakhs in addition. However, the deposit of Rs.16 lakhs is disputed by Mr.Walawalkar and he states that the said sum is not deposited. Considering the order that I have passed, I do not wish to enter into this controversy. Petition is allowed accordingly.

22. At this stage, Mr.Godbole prays for eight weeks time to challenge this order and therefore, the order of status quo passed by this Court be continued to enable him to do so. This request is opposed by Mr.Walawalkar. In my view, having held that the petitioner has been deprived of possession of the property by the order of the lower appellate court, which is quashed and set aside by me, as being patently unsustainable, so also, the petitioner having tendered the entire sale price and the sale deed being executed, this request cannot be acceded to. Request is

refused.

23. Needless to state that both suits shall be decided by the courts below uninfluenced by the observations which are wholly tentative and prima facie. They are made for the purpose of disposal of Temporary Injunction Application (Exh.5). The suits must be decided on their own merits, after the oral and documentary evidence is led.

(S.C.Dharmadhikari, J)